In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1733

CHRISTOPHER JOSEPH MUSSER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-6748

ROBERT HAINES WALDRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SEVENTH CIRCUITS

MEMORANDUM FOR THE UNITED STATES

Each petitioner alleges that he has been denied a full hearing on his claim that he is entitled to Selective Service classification as a conscientious objector.

Petitioner in No. 72-1733 was convicted after a jury-waived trial for refusal to submit to induction in violation of 50 U.S.C. App. 462(a); he received a 2 year sentence. Petitioner in No. 72-6748 was similarly convicted after trial without a jury, and sentenced to three years' probation on condition he perform work contributing to the national health, safety, or interest. Both courts of appeals affirmed.

In both cases, petitioners first claimed conscientious objector status after notices of induction were mailed to them; each asserted to his local board that his views did not become fixed until after receipt of his notice. Both boards granted courtesy interviews, but declined to reopen. Petitioner in No. 72-6748 was informed that he had presented no facts warranting a reopening and change of his classification. In No. 72-1733, the reason for denying reopening was stated to be that the "[c]laim lacks sincerity" (Pet. App. A3, n. 3). Both petitioners appeared for induction but refused to submit; their indictments and convictions followed.

In *Ehlert* v. *United States,* 402 U.S. 99, this Court held that Selective Service regulations properly require "late crystallizing" registrants such as petitioners to submit to induction and present their claims to the military (402 U.S. at 103).[1] The Court carefully noted that a late crystallizer cannot be left with no forum in which the merits of his claim will receive a full and fair adjudication (*id.* at 103-104); it accepted, however, the assurances of the Department of Defense that, despite some contradictory language in the applicable military regulations, a claim of post-notice crystallization is treated by the armed forces

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[1]The board actions which petitioners challenge were taken before *Ehlert* was decided.

as the equivalent of a claim of post-induction crystallization (*id.* at 106-107 and n. 11), and thus that "there * * * exists no possibility that late crystallizers will find themselves without a forum in which to press their claims" (*id.* at 107). This Court concluded not only that the Controlling Selective Service regulation (32 C.F.R. 1625.2) "barred presentation to the local board" of a late crystallization claim, but also that such claims must be given a full hearing by the Army after induction (*id.* at 107-108). *Ehlert* thus teaches that petitioners were entitled to a full hearing after induction and that the local boards acting under 32 C.F.R. 1625.2 were powerless to give them such a hearing before induction.

Petitioners, however, point to Army Regulation 635-20, Para. 3b(2), not mentioned in *Ehlert,* which denied in-service consideration to claims of conscientious objection if they were "claimed and denied by the Selective Service System prior to induction." Petitioners contend that if they had submitted to induction, the Army would have considered the boards' actions to be a denial of their claims, rather than a refusal to hear them,[2] and they would then have been denied a full hearing on the merits of their claim in any forum.[3]

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[2]Both board actions were ambiguous: In No. 72-1733, the stated reason for the refusal to reopen was petitioner's lack of sincerity; in No. 72-6748, the reopening was not specifically denied as untimely, and there was, at trial, some evidence that the board considered the merits of the claim.

[3]A full hearing would include the rights to a personal appearance and to appeal an adverse decision, both of which are provided when the board reopens the file but not when it refuses to reopen. Compare 32 C.F.R. 1625.4 with 32 C.F.R. 1625.13.

Both courts below rejected this contention on the grounds that the boards had no power to reopen the classification and consider the claims on the merits, and that therefore, even assuming that they had attempted to do so, such attempts were a nullity (Pet. in No. 72-1733 at App. 27; Pet. in No. 72-6748 at App. 93-94). The courts concluded that the boards' actions could not have barred Army review of petitioners' claims, and there was thus no denial of a forum. Therefore, neither petitioner was justified in refusing induction.

The courts below, we submit, reached the correct result. *Ehlert* indicates that late crystallizing conscientious objectors are entitled to a full hearing on the merits of their claim and approves the administrative interpretation of the Selective Service and Army regulations which ordinarily requires that review to take place after induction.[4] Petitioners here have prevented completion of the procedures approved in *Ehlert* by refusing induction; thus there has been no opportunity for them to have the full hearing there contemplated.

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[4]Under some circumstances, the boards apparently could reopen a late crystallizer's classification and consider his claim on the merits, affording him his right to appear personally and to appeal an adverse decision. In such circumstances, the Army could, consistently with *Ehlert*, deny a further in-service review. The crucial question is not whether there has been any board consideration of the merits, but rather whether the registrant has had "a full opportunity" to present his claims (*Ehlert, supra*, 402 U.S. at 104, 107).

Petitioner in No. 72-6748 asserts that his case was processed under a procedure which permitted the board to reopen and consider his claim, since, he alleges, the State Director of Selective Service authorized a re-opening. The court below correctly concluded that the evidence did not show that the State Director intended to give such an authorization, and even if he had, his authority to do so was not clear. In any event, the board explicitly refused to reopen and a full hearing was not provided.

Their asserted belief that an in-service forum would not be available is not well-founded.[5] If in fact the Army denied them a full hearing, it is clear that habeas corpus would be available. The argument petitioners make now, that they have been placed in the no man's land forbidden by *Ehlert*, would only at that time be a correct ground on which to grant relief.[6]

Petitioners assert that the decisions below are inconsistent with *Estep* v. *United States*, 327 U.S. 114, since they refused to accept petitioners' defense. But *Estep* held that a registrant could assert as a defense to a criminal prosecution for disobeying the board's order the claim that the board had acted without jurisdiction. Here, petitioners were permitted to assert their defense in the criminal action. *Estep* does not mean that all defenses which are heard must be accepted. In any event, the board order petitioners were required to obey was the original order to report for induction, which is not the board action of which petitioners complain. *Estep* does not require a pre-induction review of a board refusal to reconsider a valid order.

As petitioners point out, denial of reopening by local boards in circumstances substantially similar to those

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[5]In *Ehlert*, the Army based its assurance that late-crystallizing conscientious objectors would have an in-service forum in which to press their claims on A.R. 635-20 3(b)(1). There is no reason to assume that the Army was so disingenuous as to give such an assurance if Para. 3(b)(2) of that same regulation were interpreted to bar consideration of some such claims.

[6]Petitioner in No. 72-6748 assumes that the success of a habeas petition in this situation would depend on his bringing suit in a Circuit which follows the reasoning of the cases below (Pet. 14). But even the cases cited *infra* at 6, which reject this reasoning, agree that *Ehlert* would require a full hearing in the circumstances postulated, and thus any court could be expected to grant a habeas petition.

presented by these two cases have been held by the First and Third Circuits to preclude conviction for refusal to submit to induction. *United States* v. *Alioto*, 469 F. 2d 722 (C.A. 1); *United States* v. *Shomock*, 462 F. 2d 338 (C.A. 3); *United States* v. *Ziskowski*, 465 F. 2d 480 (C.A. 3); *United States* v. *Jerrold*, C.A. 1, No. 72-1320, decided June 29, 1973; *United States* v. *Folino*, C.A. 3, No. 72-1974, decided June 29, 1973.[7] For the reasons indicated above, we believe these cases were wrongly decided.

We recognize, however, that the conflicting views of the courts result in unequal treatment for persons similarly situated.[8] We therefore acquiesce in the granting of these petitions for certiorari so that the conflict may be resolved. But it does not necessarily follow that plenary consideration with oral argument is warranted. The question is not complex and, in light of the end of the draft, its resolution will not establish a lasting precedent. In this unusual situation, we suggest that summary disposition would not be

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[7]District courts in the Southern and Eastern Districts of New York have reached the same result, relying on the Third Circuit cases. *United States* v. *Cotton*, 346 F. Supp. 691 (S.D. N.Y.); *United States* v. *Usdin*, No. 72-CR-734, 6 S.S.L.R. 3039 (E.D.N.Y.).

Shomack has been cited with approval in a case not involving late crystallization in *United States* v. *Takala*, No. 47047, 5 S.S.L.R. 3773 (E.D. Mich.).

[8] Although we estimate that there are 5,900 prosecutions presently pending under the Act (approximately 4,600 of which involve fugitive defendants) and another 4,600 cases being processed for possible prosecution, we cannot say with any accuracy how many individuals may eventually be affected by this disagreement among the circuits. We do not, however, agree with counsel in No. 72-6748 that the majoriy of pending cases will be affected (Pet. 21). Moreover, we do not expect the issue to arise in many cases which involve post-*Ehlert* board actions.

inappropriate. For our part, we are content to rest on the opinions below, supplemented by the present memorandum. Petitioners may, of course, file reply briefs if they choose.

It is respectfully submitted that the petitions for writs of certiorari should be granted and the decisions of the courts of appeals summarily affirmed.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.